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No. 89-1283

In the Supreme Court of the United States

OCTOBER TERM, 1989

ARCADIA, OHIO, *et al.*,

Petitioners,

v.

OHIO POWER COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brief for Registered Holding Company Group as *Amici Curiae* in Support of Ohio Power Company

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Question Presented for Review

Whether section 318 of the Federal Power Act, 16 U.S.C. § 825q, prohibits the Federal Energy Regulatory Commission from limiting a utility to recovery of a "comparable market" price for coal purchased from an affiliated company when the Securities Exchange Commission subjects the transaction to an "at cost" standard pursuant to the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79a *et seq.*

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Brief for Registered Holding Company Group as *Amici Curiae* in Support of Ohio Power Company

Interest of *Amici Curiae*

This brief is submitted on behalf of a group[1] (the Registered Holding Company Group) that consists of six holding companies that are registered with, and subject to certain regulation by, the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act of 1935 (HCA). At the end of 1988, and for the year then ended, the aggregate consolidated assets and annual revenues of the members of the Group were, respectively, $55 billion and $18 billion.

[1] The members of the Group are Central and South West Corporation, Eastern Utility Associates, Entergy Corporation, General Public Utilities Corporation, New England Electric System and The Southern Company. The Group has obtained the consent of all parties to the case to the filing of this brief and the letters of such parties granting such consents have been lodged with the Clerk of the Court.

The result of Opinions and Orders Nos. 272 and 272-A[2] of the Federal Energy Regulatory Commission (FERC) relating to Ohio Power Company (OPCO), a public utility subsidiary of another registered holding company (American Electric Power Company), would be to subject OPCO (and the subsidiaries of other registered holding companies, such as the members of the Group) to duplicative and, as in this case, irreconcilable regulatory requirements under the HCA and the Federal Power Act (FPA). In its decision here under review, *Ohio Power Company v. Federal Energy Regulatory Commission*, 880 F.2d 1400 (D.C. Cir. 1989), the Court of Appeals vacated the FERC's order.

The Registered Holding Company Group unqualifiedly supports the decision of the Court of Appeals and herein primarily addresses the brief for the FERC and SEC (collectively the Federal Respondents).

Summary of Argument

The HCA and FPA were enacted in 1935 in a single statute, the Public Utility Act of 1935. They resulted from two bills, separately and independently drafted which had been intended to be introduced as separate pieces of legislation. It was recognized that, by reason of this history, there were some conflicts of jurisdiction between the SEC and FERC and Section 318 was included in the FPA for the express purpose of resolving such conflicts of jurisdiction in favor of the HCA.

By its express terms, FPA Section 318 denies jurisdiction to the FERC to impose any requirement with respect to the pricing of coal sold to Ohio Power Company (OPCO) by its affiliate, Southern Ohio Coal Company (SOCCO), since HCA Section 13(b) requires that such sale be made at cost.

In general, FPA Section 318 provides that if the SEC has any jurisdiction over any subject matter by reason of the self-

[2] *Ohio Power Company*, 39 Fed Energy Reg. Comm'n (CCH) ¶61,098 (1987) and 43 Fed. Energy Reg. Comm'n (CCH) ¶61,046 (1988) (herein collectively referred to as "Opinion No. 272."

operative provisions of the HCA or the implementation of the HCA by a rule, regulation or order thereunder, there is no concurrent or dual jurisdiction in FERC unless specifically mandated by the HCA or rules, regulations or orders thereunder. HCA Section 20(b) provides an express exception to that general rule by directing that the rules adopted by the SEC in respect of accounts shall not be inconsistent with those adopted by the FERC under the FPA. But this merely demonstrates that when Congress wanted to provide in the HCA and FPA for dual or concurrent regulation, it did so explicitly.

This view of the interrelationship of the two parts of the single statute is reinforced by the overall legislative history of the statute and by the specific legislative history of FPA Section 318. Indeed, in commenting on Section 318 in 1935 in an analysis furnished by the SEC to the Conference Committee, the SEC characterized the effect of Section 318 as being that "companies will be subject to regulation in respect of the same subject matter by only one commission at a time."

Thus, even if there were no actual conflict between (a) the "at-cost" directive of HCA Section 13(b) for the pricing of coal sold by SOCCO to OPCO and (b) the "market price" directive of the FERC in opinion No. 272, FPA Section 318 would deny jurisdiction to the FERC to adopt Opinion No. 272.

The FERC position stated in Opinion No. 272 was that FPA Section 318 was not applicable because the subject matter before the FERC was not the same as the subject matter before the SEC. However, in the brief on the merits of the Federal Respondents, that argument is essentially abandoned. (Federal Respondents' brief at 25, note 23). Essentially, they shift to arguing (at 36) that this Court should remand to the Court of Appeals to examine the four SEC orders. They then state that:

> "only if requiring [OPCO] to comply with FERC's order in this case would conflict with [OPCO's] obligation to comply with the four SEC orders would Section 318 render the FERC order invalid."

That position, however, overlooks the fact that, as stated by the Court of Appeals (at 1409), its decision rested on the threshold

matter of the language of the statute and not on the four SEC orders.

The decision of this Court in *Northwestern Electric* and of the Fourth Circuit in *Appalachian Power* do not support the position of the Federal Respondents in this case. Both *Northwestern* and *Appalachian* involved accounting matters, a subject with respect to which, by reason of HCA Section 20(b), the jurisdiction of FERC is not preempted by the SEC. But, to the extent that those decisions are relevant, they support the position of OPCO and these *amici curiae*.

The early decisions of the FPC in *Evans* and *Olcott Falls* do not support the position of the Federal Respondents in this case. In both cases, the FPC held that, if the SEC had jurisdiction under the HCA, then the FPC did not have jurisdiction under the FPA.

Similarly, the 1948 decision of the SEC in *Appalachian*, 27 SEC 1029, does not stand for the proposition for which it is cited by the Federal Respondents. The portion of that decision that dealt with the pricing of coal sales by Central Coal—as distinguished from the operation of two generating units by a wholly different company, Central Operating—did not assume that the FPC would have jurisdiction. Indeed, for at least two years before, and 39 years after, *Appalachian*, the FERC did not disturb coal sales to OPCO from affiliates priced at cost.

While the 1988 decisions of the FERC in *Savannah* and *Central Illinois* are consistent with the 1987 Opinion No. 272, they can scarcely be accorded precedential support for Opinion No. 272 in light of their sequence.

Opinion No. 272 is not entitled to deference under *Chevron* both because it fails the first test under *Chevron*, namely, that that court must give effect to the unambiguously expressed intent of Congress and because a court cannot affirm an agency decision on a ground other than that articulated by the agency.

I. The Petitioners and Federal Respondents Seek to Confer Upon the FERC Jurisdiction in this Case that is Expressly Denied to the FERC.

A. The Relevant Statutory Provisions Deny Such Jurisdiction to the FERC

The briefs of the Petitioners and Federal Respondents seek to rewrite the provisions of both Section 318 of the FPA and Section 13(b) of the HCA. The analysis in their briefs starts from the assumption that both the SEC and the FERC have jurisdiction. Those briefs then proceed to an analysis of whether there is a conflict between the requirements *imposed by the FERC* and those *imposed by the SEC*. However, the correct starting point is whether the *statutory* provisions themselves completely deny to the FERC any jurisdiction to impose any requirements with respect to the particular subject matter.

Section 318 of the FPA provides in pertinent part that, if with respect to any subject matter, "any person is subject both to a requirement *of the [HCA]*—*i.e.*, of the statute, not of the SEC —or of a rule, regulation or order thereunder and to a requirement *of the [FPA]*—*i.e.*, of the statute, not of the FERC— . . . the requirement *of the [HCA]* shall apply to such person, and such person shall not be subject to the requirement of [*the FPA*] . . . with respect to the same subject matter . . ." . (emphasis supplied)

Thus, contrary to the assumption of the Petitioners and the Federal Respondents, FPA Section 318 does not provide a guide for attempting to reconcile allegedly consistent and concurrent regulatory actions by the SEC and the FERC in the circumstances here presented. Rather, FPA Section 318 denies any jurisdiction to the FERC to impose *any* requirement relating to the pricing of inter-affiliate coal sales between subsidiaries of a registered holding company—whether consistent with, or different from, the standard of Section 13(b) of the HCA.

HCA Section 13(b) imposes by its express terms a requirement *of the HCA* applicable to the subject transactions, namely, it prohibits sales of services or goods between affiliates of a

registered holding company unless such sales are consistent with SEC rules, regulations or orders which, among other things, insure that such contracts are priced "at cost, fairly and equitably allocated." To that end, Section 13(b) provides in relevant part that

> " . . . it shall be unlawful for any subsidiary company of any registered holding company . . . to . . . take any step in the performance of any . . . contract by which such company undertakes to perform services . . . for, or sell goods to, any associate company thereof except in accordance with such terms and conditions and subject to such limitations and prohibitions as the [SEC] by rules and regulations or order shall prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers *and to insure that such contracts are performed economically and efficiently for the benefit of such associate companies at cost, fairly and equitably allocated among such companies.*" [3] (emphasis supplied)

By the title of Section 318 - "Conflict of Jurisdiction" - , as well as by its express terms, Section 318 of the FPA is addressed to the subject of *jurisdiction*, and denies jurisdiction to the FERC if the SEC has *jurisdiction* under the HCA.

The Federal Respondents' brief asserts (at 22) that HCA Section 21, like FPA Section 318, allocates jurisdiction between SEC and FERC by permitting concurrent regulation unless there is an actual conflict between actions of the two

[3] Section 13(b) authorizes the SEC to exempt from the foregoing provisions transactions which (1) are with an associate company that, among other things, is not a public utility operating within the United States, or (2) involve special or unusual circumstances or are not in the ordinary course of business. The SEC order, dated December 9, 1981, in *New England Electric System*, 24 SEC Docket 229, cited in FERC Opinion No. 272 (at page 61,277) as a basis for FERC's argument that HCA Section 13(b) did not preclude pricing above cost was in fact an exemption order granted by the SEC based on the special or unusual circumstances there presented. No claim has been made that the SOCCO sales to OPCO here involved have been similarly exempted by the SEC from the at cost requirement of Section 13(b).

agencies. This analysis would make FPA Section 318 a nullity. For, if, as the Federal Respondents assert, actual conflicts of actions by the two agencies are required in order to make Section 318 operative, there would have been no need for FPA Section 318—HCA Section 21 would have done all that was required. But, FPA Section 318 was intended to do, and does, much more; it assures, as the SEC stated in its comments to the Conference Committee considering the 1935 Act that "companies will be subject to regulation in respect of the same subject matter by only one commission at a time."

Thus, even if there were no actual conflict between (1) the "at cost" directive of HCA Section 13(b) and the SEC's regulations and orders thereunder and (2) the FERC's "market price" directive in Opinion No. 272, the FERC would nevertheless have no jurisdiction, by reason of the express provisions of FPA Section 318, to prescribe market pricing for SOCCO's sales of coal to OPCO.

As discussed below, HCA Section 20(b) does provide (in respect of accounts) an express exception to the general denial by FPA Section 318 of concurrent jurisdiction to both the SEC and the FERC in respect of any matter. But the general rule directed by Section 318 is that, if the SEC has jurisdiction over any subject matter by reason of the HCA, there is no concurrent or dual jurisdiction in the FERC unless specifically mandated by the HCA or rules, regulations or orders thereunder, *i.e.*, unless otherwise expressly provided in the HCA, once a person is subject to a requirement of the HCA (by reason of the self-operative terms of the particular provision of the HCA or a rule, regulation or order adopted by the SEC thereunder) with respect to *any subject matter*, the FERC lacks jurisdiction to impose *any* requirement relating to that particular subject matter whether it is exactly the *same* requirement as that imposed by the SEC, or is the same requirement plus an additional condition, or is a different requirement, unless the SEC has exempted such person from such requirement of the HCA.

In this case, the Court does not need to determine the full reach of Section 318. For it is abundantly clear that there is

an actual conflict resulting from the FERC's attempt in Opinion No. 272 to impose a market price test (whether market price is above or below cost) for such sales with the at-cost price directive of HCA Section 13(b).

It is undisputed in this proceeding that the coal produced by Southern Ohio Coal Company (SOCCO) and sold by SOCCO to OPCO was priced at SOCCO's cost, as determined in accordance with HCA 13(b). Yet, notwithstanding FPA Section 318, the FERC asserted in Opinion No. 272:

> "*We have taken full account of the fact that the SEC has jurisdiction, under PUHCA, to regulate the price of coal purchased by Ohio Power from the Martinka mine.* The SEC's jurisdiction, however, does not extend to setting rates and determining what fuel costs Ohio Power may collect from its wholesale customers. There is thus no conflict in the regulation by the SEC and the regulation by this Commission[4]." (emphasis supplied)

The FERC was at some pains in Opinion No. 272 to make clear its controlling rationale that:

> "Although the SEC may limit the affiliate transfer price to costs even when market prices are higher than costs, for electric rate purposes Ohio Power will have the option to charge its wholesale customers up to the market price for that affiliate coal. Consequently, Ohio Power is not, as it alleges, required to limit its rate recovery of Martinka coal costs to the lower of the two standards."[5]

Opinion Nc. 272 went even further and directed OPCO to modify its fuel adjustment clause to provide for the recovery through the automatic operation of the fuel adjustment clause of an amount up to the market price for all coal purchased from SOCCO, without regard to whether market exceeds cost.[6]

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[4] Opinion No. 272, 39 Fed. Energy Reg. Comm'n (CCH) ¶61,098 (1987) at page 61,277.

[5] *Ibid*, at page 61,287

[6] *Ibid*, at pages 61,288-9.

In a belated effort to avoid the dilemma created by Opinion No. 272, the Federal Respondents' brief concludes (at 36):

> "Only if requiring Ohio Power to comply with FERC's order in this case would conflict with that company's obligation to comply with the four SEC *orders* would Section 318 render the FERC order invalid." (emphasis supplied)

The brief then requests that this Court remand the case for inquiry by the Court of Appeals into the meaning of the four SEC *orders*. But that request ignores the clear holding of the Court of Appeals that its decision was based on the statute and not on such orders. As the Court of Appeals stated (at 1409):

> ". . . our decision nevertheless rests on the threshold matter of the language of the statute, which commits the determination of the inter-associate price to the SEC. Whether the SEC acquits itself well or ill is not our present concern."

B. Contrary to the Claim of the Federal Respondents, Neither the FPA nor the HCA Provides for Concurrent Regulation Except With Respect to Accounting Matters

The Federal Respondents' brief asserts (at 12 and elsewhere) that:

> ". . . the agencies take the position that Section 318, along with several provisions of PUHCA, allow substantial room for concurrent, consistent regulation."

As we have demonstrated, that view is not supported by the terms of FPA Section 318 itself. Moreover, as we shall demonstrate below (at pages 12-17), that view is not supported by the legislative history of the Public Utility Act of 1935 in which, for example, the SEC (in its analysis submitted to the Conference Committee) characterized Section 318 in the following terms:

> "In general, the effect of the provision above quoted will apparently be that companies will be subject to

> regulation in respect of the same subject matter by only one Commission at a time . . . "

Moreover, that view is not supported by the two provisions of the HCA (Sections 21 and 20(b)) which the Federal Respondents' brief cites as providing such support (at 22).

Specifically, HCA Section 21 provides (in pertinent part):

> " . . . nor shall anything in [the HCA] affect the *jurisdiction* of any other commission . . . of the United States . . . over any person . . . or contract insofar as such *jurisdiction* does not conflict with any provision of the [HCA] or any rule, regulation or order thereunder." (emphasis supplied)

The corollary of that provision is that, if the jurisdiction of another commission [e.g. the FERC] does conflict with any provision of the HCA [e.g. Section 13(b) directing "at-cost" pricing of sales between affiliates], such HCA provision controls. Stated in another way, although the provision is stated in a somewhat convoluted form, its meaning as applied to this situation is that, since the SEC has *jurisdiction* and a statutory command under HCA Section 13(b) to prescribe inter-affiliate pricing of coal purchases at cost, any claim by the FERC of *jurisdiction* under the FPA to price such inter-affiliate coal purchases on any basis other than cost conflicts with the HCA and, therefore, such a claim of jurisdiction by the FERC is proscribed by HCA Section 21.

Nor are the Federal Respondents correct in their assertion that their position "is buttressed by" Section 20(b) of the HCA, which provides in pertinent part:

> "(b) In the case of the accounts of any company whose methods of accounting are prescribed under the provision of any law of the United States . . . the rules and regulations or orders of the [SEC] in respect of accounts shall not be inconsistent with the requirements imposed by such laws or any rule or regulation thereunder; . . . But this provision shall not prevent the [SEC] from imposing such additional requirements regarding reports or accounts as it may deem

> necessary or appropriate in the public interest or for the protection of investors or consumers."

What Section 20(b) of the HCA demonstrates, instead, is that when Congress wanted to provide in the HCA and FPA for dual regulation in relation to a specific matter, namely, the keeping of accounts, it did so explicitly. In the absence of HCA Section 20(b), the provisions of HCA Sections 15 and 20(a) giving the SEC authority to prescribe many accounting matters, coupled with Section 318 of the FPA, could have produced a result in which the FERC did not have jurisdiction over accounting matters for subsidiaries of registered holding companies. However, this was an area where Congress concluded in both the FPA and HCA that regulation by both the SEC and the FERC was appropriate and, in HCA Sections 15, 20(a) and 20(b) and in FPA Section 301(b), it made explicit provisions for it.

It is also noteworthy that Congress did not make the FERC accounting regulations under the FPA pre-emptive as against SEC accounting requirements under HCA Sections 15 and 20(a). Instead, HCA Section 20(b) expressly permits the SEC to prescribe "such additional requirements regarding reports or accounts as it may deem necessary or appropriate."

Thus, the pattern and interrelations of the statutory provisions of the HCA and FPA are clear, namely:

1. As a general rule, by virtue of FPA Section 318, if a person would be subject with respect to any matter to a requirement *of the HCA* and to a requirement *of the FPA*, such person is not subject to *the FPA* requirement with respect to that matter and the FERC has no jurisdiction of that matter.
2. By virtue of HCA Section 21, nothing in the HCA affects the jurisdiction of the FERC over any person "insofar as such jurisdiction of the FERC does not conflict with any provision of the HCA, or rule, regulation or order thereunder". However, if such jurisdiction of the FERC does conflict with any provision of the HCA, then the HCA does apply and the FPA does not.

3. There are three qualifications with respect to the foregoing, namely, (a) if the SEC has exempted a person from an HCA requirement, then an FPA requirement applicable to such person is not preempted, (b) if the HCA provision is not self-operative by its terms and has not been implemented by an SEC rule, regulation or order, then the FPA requirement applicable to such person is not preempted until such provision is so implemented by the SEC, and (c) if accounting matters are involved, the SEC requirements shall not be inconsistent with FERC requirements, but the SEC may also impose additional requirements.

C. The Overall Legislative History of the FPA and the HCA Supports the Holding of the Court of Appeals.

The brief of the Federal Respondents (at 3) characterizes the article of Dozier DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 37 (1945) as "the history of the consolidation of the two statutes into what ultimately became the Public Utility Act of 1935." But the Federal Respondents' brief fails to discuss the relevant portions of that history, as described in that Article.

At the time of the drafting and enactment of the Public Utility Act of 1935, Mr. DeVane was the Solicitor of the Federal Power Commission and he and FPC Commissioner Seavey were the major drafters and proponents before the Congressional Committees of the Titles II and III of that Act.[7] In his 1945 article, he pointed out that Title I of that Act (the HCA) and Titles II and III of that Act (the FPA) resulted from "two bills, separately and independently drafted [which] were intended to be introduced in Congress as separate pieces of legislation."[8] However, early in 1935, it was determined by the Congressional leaders that the two bills should be consolidated and introduced in Congress as a single bill.

[7] For Commissioner Seavey's role in drafting the 1935 amendments to the Federal Power Act, see 3 FPC iii (1942-3). At the time of publication in 1945 of his cited article, Mr. DeVane was United States District Judge of the Northern and Southern Districts of Florida.

[8] *Op. Cit.*, at 37.

Mr. DeVane's article states that, due to the fact that "each bill had been prepared entirely independently of the other," there were some conflicts in the proposed legislation and the task of redrafting them into a single bill turned out to be more of an undertaking than the time allotted for the task permitted. His article then states (footnotes omitted).[9]

> "When it became obvious that the task assigned the committee could not be accomplished in the time allotted, those in charge of the drafting of the two bills got together and agreed upon the substance of an amendment to the Holding Company Bill, later incorporated in Section 3 of that Bill, (which was intended to provide for full cooperation between the Securities and Exchange Commission and the Federal Power Commission in administering the two acts) and to Section 318 of the Federal Power Bill (now Section 317 of that Act), resolving conflicts in favor of the Holding Company Act. The two bills, as originally drafted, but with the addition of Section 318, were then consolidated into a single bill without further change and introduced by Senator Wheeler (S.1725), and Congressman Rayburn (H.R. 5423), on the same day, February 6, 1935, as the 'Public Utility Act of 1935'."

As discussed below, the direct challenge by the FERC to the pre-emptive jurisdiction of the SEC under the HCA by reason of FPA Section 318 is a recent phenomenon.

D. The Specific Legislative History of Section 318 of the FPA Supports the Holding of the Court of Appeals

As stated in Mr. DeVane's article, the substance of the present Section 318 of the Federal Power Act (initially Section 317) was contained in the original version of the 1935 Act proposed in H.R. 5423 introduced by Congressman Rayburn and in S. 1725 by Senator Wheeler. FPC Commissioner Seavey, at the invita-

[9] *Op. Cit.* at 37-38. Nothing in Mr. DeVane's article suggests that FPA Section 318 should be taken at other than face value — *i.e.*, nothing therein supports the position of the Federal Respondents that Section 318 relates only to conflicts in *holdings* by the FERC and SEC rather than in *jurisdiction*.

tion of the House Committee on Interstate and Foreign Commerce, presented a memorandum discussing Titles II and III of H.R. 5423. Insofar as Section 317 of that bill was concerned, that memorandum stated (Hearings before House Interstate and Foreign Commerce Committee on H.R. 5423, at 388):

> "Section 317 provides that in case of conflict between *the provisions* of the Federal Power Act and the Holding Company Act of 1935 the requirements of the latter *act* shall apply." (emphasis supplied)

The May 13, 1935 Report of the Senate Committee on Interstate Commerce (74th Cong., 1st Session, Report No. 621) accompanying S.2796, described (at page 54) what was Section 316 in that bill in the following terms:

> "Section 316 provides that in case of conflict between *the provisions of* the Federal Power Act and the Public Utility Holding Company Act of 1935, the requirements of the latter *act* shall apply, unless the person subject to such requirement has been exempted by the Securities and Exchange Commission." (emphasis supplied)

The June 24, 1935 Report of the House Committee on Interstate and Foreign Commerce (74th Cong., 1st Session, Report No. 1318), accompanying the House substitute for S.2796, described (at page 35) what was Section 318 in that bill in the following terms:

> "This section provides that in case of conflict between the *provisions* of the amended Federal Power Act and the Public Utility Holding Company Act of 1935, the requirements of the latter *act, and not those of the Power Act*, shall apply, unless the person subject to such requirement has been exempted by the Securities and Exchange Commission." (emphasis supplied)

During the debate in the House, a floor amendment of Section 318 was adopted by the House that would have radically changed the thrust of Section 318. Specifically, that floor amendment provided that, with respect to any of the

matters specified in Section 318, in the event that a person would be subject to the law of any state or regulation by a state commission, such person would not be subject to a requirement under the Federal Power Act or rule or regulation thereunder. See 79 Cong. Rec. 10574-5 (1935). However, that amendment did not survive in conference.

While the combined HCA and FPA bill was before the Conference Committee, the SEC submitted an analysis of the material differences between the bill as passed by the Senate and by the House.[10] The SEC comments in general did not discuss the provisions of the Federal Power Act except where they seemed to affect the duties of the SEC. In that context, the SEC Comments stated:

> "Most of the provisions of this title do not directly concern the Securities and Exchange Commission. Part II of this title in general provides for regulation by the Federal Power Commission of persons who own or operate facilities for the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce. . . . In several respects the regulation authorized by this title is similar to that authorized by the Holding Company Act. Thus Section 203 concerns the disposition of property, consolidations and purchase of securities; Section 204 provides for the regulation of the issuance of securities and assumption of liabilities; and Sections 301 and 302 (304 in the House Bill), respectively, provide for the making of accounts and periodic and other reports.
>
> "There will be many holding companies and their subsidiaries which would be subject to the provisions above referenced to were it not for Section 316 of the Senate Bill and 318 of the House Bill . . .
>
> "In general, the effect of the provision above quoted will apparently be that companies will be

[10] Appendix B to Petition of FERC for Rehearing and Suggestion for Rehearing *En Banc*, dated September 11, 1989, to Court of Appeals.

> subject to regulation in respect of the same subject matter *by only one Commission at a time*, but in case a company ceases to be a holding company or subsidiary it will automatically be immediately transferred from the *jurisdiction* of the Securities and Exchange Commission to that of the Federal Power Commission. For this reason it will be necessary for the two Commissions to collaborate closely in the preparation of regulations." (emphasis supplied)

In describing the conference substitute bill, the Managers on the part of the House (in House Report 1903, 74th Cong. *1st* Session, August 23, 1935) stated in part,

> "In subsection (a) of section 318, in which conflicts *of jurisdiction* between the Securities and Exchange Commission and the Federal Power Commission under this bill are resolved in favor of the former, the House amendment adds to such matters of conflict the assumption of obligation or liability in respect of a security. The conference substitute is enlarged *to include any conflict* arising under this bill. (emphasis supplied)
>
> 'Subsection (b) of section 318, in the House amendment, excluded Federal regulation as provided in the two new parts added to the Power Act, of any matter as to which there is authority in a State commission. This subsection in the Senate bill provided that an interstate public-utility company shall not by this act be relieved from compliance with State laws. The conference substitute omits this subsection."

Thus, from the beginning and throughout the congressional consideration of the 1935 Act, it was clear that (1) the initial drafters of HCA Section 318 (who were principally associated with the FPC) and the Congressional bodies adopting the proposed legislation did not intend that a utility should be subjected to dual or concurrent regulation under the FPA and under the HCA and (2) in the event of a conflict between the two acts (which was likely), jurisdiction would be resolved in favor

of the HCA. As noted above, this intention was underscored by the inclusion in Section 318 of the conference committee substitute bill of the phrase "or any other subject matter."

Against this background, we submit that the Federal Respondents' brief (at 25) misinterprets the explanation by Representative Wadsworth of his reasons for withdrawal of a floor amendment that he had previously offered. Representative Wadsworth stated the objective of his proposed amendment had been to eliminate

> "the very serious and extensive duplication of effort and expense, both to the Government and to the persons to be supervised, if this jurisdiction over the utilities field should be divided between the Securities and Exchange Commission and the Federal Power Commission. It was the purpose of my amendment to center the jurisdiction in one commission in order to avoid such duplication." 79 Cong. Rec.-10507 (1935)

A little later, Representative Wadsworth added:

> " . . . section 318 in large measure meets my objection, and I, therefore, ask unanimous consent to withdraw the amendment which I offered on Saturday afternoon." (*Ibid*)

II. To the Extent Relevant, the Prior Decisions of this and Other Courts and of the two Commissions do Not Sustain the Position of the Petitioners and Federal Respondents

A. *Northwestern Electric Co. v. FPC*, 321 U.S.119 (1944)

Both the Federal Respondents and the Petitioners claim (on three occasions in each of their briefs) that the holding of the Court of Appeals is inconsistent with the decision of this Court in *Northwestern Electric Co. v. FPC*, 321 U.S. 119 (1944). However, in the light of the vigor of the presentations of the Federal Respondents and Petitioners that the Court should grant deference to the views of the FERC, it is interesting that

in this case neither the FERC nor the FERC Administrative Law Judge referred to *Northwestern* in their respective opinions. In addition, given the thoroughness of their examination of the legal issues in this case, it is particularly significant that neither the majority of the Court of Appeals nor concurring Judge Mikva in this case referred to *Northwestern*.

We submit that the references in the briefs of the Petitioners and Federal Respondents to this Court's decision in *Northwestern* do not correctly reflect the narrow holding of this Court in that case and the background of that holding.

Acting under Section 301(a) of the FPA, in 1936 the FPC prescribed a uniform system of accounts for electric utilities and licensees and ordered such utilities to reclassify their electric plant accounts in accordance therewith and to submit adjusting entries necessary to reflect that reclassification as of January 1, 1937. After Northwestern submitted a purported reclassification, the FPC found that such reclassification included an item of $3,500,000 which was a "write up" for which the utility had received no value and directed that it be eliminated by the utility over time by applying all its net income above preferred stock dividend requirements against such "write-up."[11] *Northwestern Electric Co.*, 2 FPC 327 (1940), 3 FPC 83 (1942). Nowhere in those lengthy opinions of the FPC nor in the procedural orders reported in that *Northwestern* docket at 2 FPC 784, 853, 859, and 924 was there any reference to Section 318 of the FPA.

Upon separate appeals, the two orders of the FPC were affirmed by the Court of Appeals for the Ninth Circuit. *Northwestern Electric Company v. Federal Power Commission*, 125 F. 2d 882 (9th C.A., 1942), 134 F. 2d 740 (9th C.A., 1943).

[11] The FPC stated that it would have been entirely proper to order the $3,500,000 to be charged *at once* to *Northwestern's* earned surplus, but that it did not do so because that would have created a large deficit in Northwestern's surplus which, in the light of an earlier HCA order of the SEC (*Northwestern Electric Company*, 6 SEC 57 1939), would have precluded the payment of dividends to the holders of Northwestern's preferred stock, who had paid $4,800,000 into Northwestern (in contrast to the common stockholders who had paid nothing.) 2 FPC at 343-4; 3 FPC at 86.

Nowhere in the opinions of the Ninth Circuit was there any reference to FPA Section 318.

In its Petition to this Court for a writ of *certiorari*, *Northwestern* urged that "the method of write-off ordered by the [FPC] is invalid in that it involves an unlawful assumption by the Commission of jurisdiction over the payment of dividends by *Northwestern* and over a corporate reorganization of Northwestern," on the ground that HCA Section 11 granted powers to the SEC with respect to reorganizations and HCA §12(c) vests in the SEC jurisdiction over the payment of dividends and that FPA Section 318 excluded the FPC from the exercise of such jurisdiction.[12]

After *certiorari* was granted, the Department of Justice informally requested a statement by the SEC with respect to the conflicts of jurisdiction asserted by *Northwestern*. The 10-page printed letter, December 10, 1943, from SEC Chairman Purcell (plus 24 printed page attachment) responding to that request was Appendix D to the FPC's brief on the merits in that case and is now heavily relied upon and is quoted, in part, in the brief of the Federal Respondents in this case (at 14, 15, 26). However, they apparently do not recognize the key element in Chairman Purcell's analysis, even though they quote it in part.

In that letter, Chairman Purcell stated that:

> "Not all of the provisions of the [HCA] are self-operative, however; and in the absence of rules, regulations or orders of the S.E.C. implementing *such* provisions of that Act, these provision neither compel nor prohibit any action. Until the SEC does by rule or order impose 'requirements' pursuant to the sections *which are not-self-operative*, there can be no conflict of requirements and Sec. 318 does not apply." (emphasis supplied)

He then noted that all of the argument of the Petitioners in *Northwestern* as to "alleged conflicts between the *jurisdictions* of the F.P.C. and S.E.C. relates to sections of

[12] Petition at 30-31.

the [HCA] which are not self-operative," namely, Sections 15(a), 20, 12(c) and 11(b), and he proceeded to point out, in detail, that there were no orders or rules of the SEC thereunder which conflicted with the FPC's action in *Northwestern*.

As Chairman Purcell's letter noted, the HCA provisions relating to accounts and other HCA provisions he identified in that letter are not self-operative. By contrast, HCA Section 13(b) is a requirement which is self-operative in the sense employed by Chairman Purcell: unless an exemption is granted, it prohibits the entry into, or the taking of any step in the performance of, a service, sale or construction contract by a subsidiary of a registered holding company for an associate company except in accordance with such terms as the SEC prescribes to insure that such contracts are performed at cost fairly and equitably allocated. The orders of the SEC (J.A., pages 76-96) authorizing (1) the issuance and sale of common stock by SOCCO and the acquisition of such SOCCO common stock by OPCO, (2) the development and mining by SOCCO of the coal reserves acquired by it for sale exclusively to companies in the American Electric Power System, (3) the transfer of investment in coal mining development and associated facilities to OPCO and related matters, and (4) the financing of OPCO, granted the actual authorization required under HCA Section 13(b) for OPCO to engage in such transactions with OPCO. By reason of HCA Section 13(b) such transactions were required to be conducted at cost. Consequently, employing Chairman Purcell's analysis, while FPA Section 318 would not have been applicable in the *Northwestern* case, it is applicable in Ohio Power's present case.

The opinion of this Court in *Northwestern* did not treat the last-stage effort of the utility to invoke FPA Section 318 as worthy of any detailed analysis. Instead, the Court simply stated (321 U.S. at 125):

> "The petitioners attack the regulations as in conflict with the powers and the regulations of the Securities and Exchange Commission, which also has regulatory power over Northwestern; but an examination of the statute and of the orders and proceedings of the Securities and Exchange Commission satisfies us that no conflict exists."

Given the circumstances of the Court's decision, we do not urge that its holding in *Northwestern* provides compelling support for our position here. We do assert, however, that it provides better support for our position than for the position of the Federal Respondents.

B. *Appalachian Power Co. v. FPC*, 328 F. 2d 237 (4th Cir., 1964), *cert. denied*, 379 U.S. 829 (1964)

The brief of the Federal Respondents, in summarizing (at 26-27) the holding of the Fourth Circuit in *Appalachian Power Co.*, ignores the fact (discussed above) that, in relation to the keeping of accounts and accounting matters, HCA Section 20(b) provides that the rules, regulations and orders of the SEC in respect of accounts shall not be inconsistent with the requirements imposed by the FPA or any rule or regulation thereunder. In that area dual jurisdiction under the HCA and FPA is expressly authorized by the HCA.

That *Appalachian* case involved proceedings initiated by the FPC by an order directing Appalachian to show cause why its accounting practices should not be found in violation of the FPC's Uniform System of Accounts—a matter in which, by reason of HCA Section 20(b), the jurisdiction of the FPC was not pre-empted by FPC Section 318. Moreover, that case involved a subject in which the relevant HCA grant of jurisdiction to the SEC (in Sections 15 and 20(a)) was not self-operative. Rather, to the extent that the SEC had exercised its jurisdictional powers with respect to that subject as applicable to the issue involved in *Appalachian*, the SEC had done so by approving the use of the balance sheet captions and classifications prescribed by Order 204 of the FPC.

In its opinion in *Appalachian*, the Court of Appeals also referred (at 250) to the letter of SEC Chairman Purcell appended to the brief of the Solicitor General in the *Northwestern Electric Co.* case discussed above. Our comments in that context in connection with *Northwestern*, are also applicable in the context of the *Appalachian* case.

C. *George B. Evans*, 1 FPC 511 (1937) *Olcott Falls Co.*, 3 FPC 310 (1942)

The Federal Respondents brief asserts (at pages 18 - 19, 32) that "[t]he roots of FERC's 'actual conflict' position date back to just after the enactment of the FPA," citing *In re George B. Evans* and *In Re Olcott Falls Co.* However, those decisions and subsequent decisions do not support the gloss now given to them by the Federal Respondents' brief.

For an understanding of those (and subsequent) decisions, it is necessary to review briefly the interaction of several provisions of the HCA and the FPA, having to do with (1) the issuance of securities and assumption of liabilities by a registered holding company and/or subsidiary thereof, (2) the acquisition of utility assets by a registered holding company and/or subsidiary thereof, and (3) the disposition by a registered holding company and/or subsidiary thereof, by sale or lease of utility assets or utility securities. In *Evans* and *Olcott Falls*, the FPC recognized that, if the SEC had jurisdiction under the HCA of all aspects of the transaction, the FPC would not have any jurisdiction by reason of FPC Section 318. On the other hand, if the SEC had jurisdiction under the HCA with respect to one side (*e.g.*, a purchase of utility assets by a subsidiary of a registered holding company) but did not have jurisdiction under the HCA with respect to the other (*e.g.*, the sale of utility assets by a subsidiary of a registered holding company), then the FPA could have jurisdiction under the FPC with respect to such sale.

In *Evans* (and in the related SEC proceedings, *Laclede Power & Light Company*, 2 SEC 466 (1937)), both the SEC and FPC recognized that the SEC had jurisdiction (i) under HCA Sections 6 and 7 with respect to the issuance by Laclede of securities and the assumption of liabilities, and (ii) under HCA Sections 9 and 10 with respect to the acquisition by Laclede of utility assets, and the FPC expressly conceded (at 520) that this was the "result of the operation of section 318" of the FPA. However, at that time it was assumed (without discussion in the FPC and SEC opinions) that the SEC did not have jurisdiction with respect to the sale and lease of the utility

facilities there involved and, therefore, that the FPC had jurisdiction of such sale and lease under FPA Section 203. That assumption was also involved in the application under FPA Section 203 by *Olcott Falls Company* to the FPC for authority to sell its utility assets to Bellow Falls Hydro-Electric Falls Company, a subsidiary of a registered holding company.

That assumption stemmed from HCA Section 12(d) which provides in pertinent part:

> "It shall be unlawful for *any registered holding company* . . . to sell . . . any utility assets, in contravention of such rules and regulations or orders . . . as the [SEC] deems necessary or appropriate in the public interest . . ." (emphasis supplied)

Initially, there was a question as to whether HCA Section 12(d) applied to a sale by a subsidiary (as distinguished from a registered holding company) of utility assets. However, the SEC soon adopted Rule U-12D-1 under the HCA. That Rule required the filing of a declaration under HCA Section 12(d) for authorization of the SEC for the "direct or indirect sale" of utility assets by a registered holding company. In 1938 the SEC held that, in some such transactions, the subsidiary was merely an agent for its registered holding company parent, that the sale was, therefore, an indirect sale by the registered holding company parent, and that the SEC thus had jurisdiction over such a sale pursuant to HCA Section 12(d) and SEC Rule U-12D-1. See *Kentucky-Tennessee Light and Power Company*, 4 SEC 206 (1938); *Iowa Public Service Company*, 6 SEC 435 (1939). That position was strengthened in the SEC's Rule 44 adopted under the HCA more than forty years ago and has not been effectively challenged since then.

Olcott Falls involved an additional aspect relating to the acquisition side of a transaction. Section 9(a) of the HCA generally requires SEC authorization under HCA Section 10 for the acquisition of utility assets by a registered holding company or subsidiary thereof. However, HCA Section 9(b)(1) provides that such SEC authorization is not required for the acquisition by a public utility company of utility assets the

acquisition of which has been expressly authorized by a State Commission. If the acquisition by Bellows Falls of the Olcott Falls utility assets was expressly authorized by a State commission and, by reason of HCA Section 9(b)(1), did not require SEC authorization, FPC authorization of such an acquisition would have been required under FPA Section 203. In its *Olcott Falls* decision, 3 FPC at 312, the FPC stated that the decision on that matter was to be made in the first instance by the SEC and that it was not acting on the matter of such acquisition until a decision had been made by the SEC.

Subsequently, in *Bellows Falls Hydro-Electric Corporation*, 12 SEC 341 (1942), the SEC approved an application under HCA Section 12(d) by the parent of Olcott Falls to sell the subject utility assets, as well as the application of Bellows Falls under HCA Section 10 to acquire such assets, so that, ultimately, there was no need for FPC authorization of either side of the transaction.

We suggest that a fair reading of the FPC decisions in *Evans* and *Olcott Falls* is that the FPC recognized very early on that its *jurisdiction* was limited by FPA Section 318 and that the FPC had jurisdiction in connection with the purchase or sale of assets or the issuance of securities only with respect to those aspects of such transactions that were not subject to SEC jurisdiction under the HCA. Nothing in those decisions of the FPC (or in the related decisions of the SEC) suggests that they were premised on the "actual conflict" or "dual and concurring jurisdiction" positions now espoused by the Federal Respondents.

D. *Appalachian Elec. Power Co.*, 27 SEC 1029 (1948)

This decision involved a proceeding in which the SEC approved an application relating to the formation of two new subsidiaries of a registered holding company, American Electric Power, parent of Appalachian Electric Power Company and Ohio Power Company. Appalachian and Ohio Power were each financing and constructing a new generating unit which were capable of being operated together as a single station. One of those new subsidiaries, Central Operating Company,

was to operate these new generating units: the other, Central Coal, was to supply coal to those units at cost. The SEC order recited (at 1032 and 1035) that the record before it stated that the contract between *Central Operating* and the two affiliated utilities for which it was to operate the generating units was subject to approval by the FPC. However, it is noteworthy that that SEC order does not contain a similar statement with respect to *Central Coal*, which presents a situation precisely similar to that here presented.[13] Thus, the material from the SEC's decision in *Appalachian* quoted at page 17 of the Federal Respondents' brief is not applicable to OPCO's coal purchases from OPCO.

The FERC's Opinion 272 in 1987 constituted a radical departure from the practice employed by it for the preceding forty-one years. Beginning at least as early as 1946, the SEC authorized the formation of coal mining subsidiaries to sell coal to OPCO priced at cost (including a reasonable return on OPCO's investment in such companies). See *Ohio Power Company*, Holding Company Act Release No. 7031 (1946), Holding Company Act Release No. 8079 (1948); *Appalachian*, *supra* (1948). Although occasionally questioned by members of the FERC staff, the pricing of such sales to OPCO in conformity with SEC authorization was not disturbed by the FERC until Opinion 272 was issued.

E. *Savannah Elec. & Power Co.*, 42 Fed. Energy Reg. Comm'n Rep (CCH) ¶ 61,240 (1988)

Central Illinois Pub. Ser. Co., 42 Fed. Energy Reg. Comm'n Rep (CCH) ¶ 61,073 (1988)

The brief of the Federal Respondents is correct in stating (at 18) that the "FERC has *recently* taken the same position" (emphasis supplied) in other cases (citing *Savannah* and *Central Illinois*) as it took in 1987 in Opinion No. 272. How-

[13] Instead, the SEC order stated (at 1034):

> "Our approval herein should not be construed as precluding further action by any proper regulatory authority with *respect to the return of Appalachian and Ohio on their investment in Central Coal.*" (emphasis supplied)

ever, it should be noted that, in these 1988 cases, the FERC, after asserting jurisdiction, authorized the transactions on the merits so that there was no occasion for judicial review. Thus, the unreviewed assertions of jurisdiction by the FERC in *Savannah* and *Central Illinois* (which the Group believes were incorrectly decided and which reversed earlier decisions[14]) provide no substantive support for its *1987* decision here involved.

III. The Views Attributed to the FERC and SEC in the Federal Respondents' Brief are not Entitled to Deference Under *Chevron*

The Federal Respondents' brief (at 14 and elsewhere) asserts that "the long-standing interpretation by both the SEC and FERC requiring actual conflict before Section 318 ousts FERC jurisdiction is entitled to substantial deference."[15] However, as we have previously demonstrated, the FERC did not in Opinion 272 even refer to, let alone rely upon, the decisions which the Federal Respondents' brief now asserts establish the "long standing interpretation by both the SEC and FERC." Since a court cannot affirm an agency decision on a ground other than that articulated by the agency, those decisions do not provide a basis for the deference to which the Federal Respondents now lay claim. Moreover, as we have demonstrated by analysis of each of the decisions cited by the Federal Respondents, those decisions do not support the Federal Respondents' position in this case. Rather, what emerges is that it was not until this case that the FERC elected to challenge

[14] *Iowa Power & Light Co.*, 9 Fed. Energy Reg. Comm'n (CCH) ¶61,099 (1980); *Sierra Pacific Power Co.*, 27 Fed. Energy Reg. Comm'n (CCH) ¶61,081 (1984); *Texas-New Mexico Power Co.*, 28 Fed. Energy Reg. Comm'n, ¶61,079 (1984) and *Iowa Southern Utilities Company*, 35 Fed. Energy Reg. Comm'n ¶61,149 (1986)

[15] In *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke Law Journal 511, Justice Scalia pointed out (at 517) that under *Chevron* "there is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law."

directly the actual terms of FPC Section 318, and then subsequently (and incorrectly) proceeded to apply its rationale in this case to other cases then pending before it.

The Federal Respondents' brief also ignores the most fundamental aspect of *Chevron*, namely,

> "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Chevron, U.S.A. Inc. v. NRDC, 467 U.S. 837 at 842 (1984).

For the reasons set forth above, we submit that the intent of Congress in FPA Section 318 is made clear by its express terms and by its legislative history and that the passage of more than a half century since its enactment has not obscured that clear intent.

CONCLUSION

The position advanced in the Federal Respondents' brief attempts to blur and confuse two separate issues, namely:

1. Does the FERC have jurisdiction to prescribe a price for the coal sold to OPCO by SOCCO other than the "at-cost price, fairly and equitably allocated" required by HCA Section 13(b)?

For the reasons discussed above, we submit that the FERC has no such jurisdiction.

2. Assuming that the FERC has no jurisdiction to require that SOCCO sell such coal to OPCO at a price other than "at cost," in fixing OPCO's rates is the FERC free to ignore the payments actually made by OPCO to SOCCO in accordance with HCA Section 13(b)?

Concurring Judge Mikva agreed with his colleagues that the "FERC and SEC are clearly regulating the same subject matter, namely, the price of coal between Ohio Power and

Southern Ohio." He simply questioned whether HCA Section 13(b) and/or the SEC orders required an at-cost price. If they did, he would have joined the majority of the Court of Appeals who regarded such pricing as binding upon the FERC.

The Federal Respondents in their brief disagree. They assert that, in the light of the "difference in the goals and expertise" of the two agencies, the FERC is free to disregard the fact that the payments were actually made by OPCO to SOCCO over a period of many years and reflected SOCCO's costs fairly and equitably allocated. They also assert (at 23) that this Court's decisions in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) and *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) have no bearing in this case because they

> " . . . were not based on concerns that 'cost trapping' would result from permitting concurrent state ratemaking review."

We find no basis for such a crabbed reading of those decisions.

Those decisions were based in part on the filed rate doctrine. But, more broadly, as stated by this Court (*Nantahala*, at 966):

> "Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC - approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority . . . and to ensure that the States do not interfere with this authority."

In the same way, as the Court made clear in *Nantahala* and *Mississippi Power & Light Company v. Mississippi*, 487 U.S. 354 (1988), in the event of an increase in the price of OPCO's purchases at cost of coal from SOCCO, such increases in OPCO's coal purchase costs need not necessarily lead to an

increase in the rates OPCO charges to its wholesale customers. But such a divergence from the need to reflect such increased coal costs in OPCO's rates to its wholesale customers could occur only if OPCO's costs (other than those resulting from the purchases of coal at SOCCO's costs as prescribed by HCA Section 13(b)) were to decrease. *Nantahala*, at 967; *Mississippi Power & Light* at 56 U.S.L.W. 4751, 4756 (U.S. June 24, 1988).

In this *Ohio Power* case it is clear that there is no occasion to consider the possibility of offsetting decreases in other costs, since all issues in the FERC proceeding had been settled except the extent to which OPCO could include its costs for "captive coal" purchased from SOCCO in its recoverable cost of service. *Ohio Power Co. v. FERC*, 880 F. 2d 1400, 1404; *Ohio Power Co.*, 39 FERC ¶61,098, at 61,274 (1987).

We do not, of course, dispute that in some respects there are important differences in the roles and focus of the SEC under the HCA and those of the FERC under the FPA, as illustrated by *City of Lafayette v. SEC*, 454 F. 2d 941 (D.C. Cir. 1071), aff'd *sub nom. Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 754-755 (1973). But, in FPA Section 318, Congress explicitly recognized that, given the manner in which the two Acts had been independently developed, there was a potential for duplicative regulatory action by the SEC and the FERC with resulting burdens on government and utilities. Congress, therefore, in FPA Section 318 specifically limited the FERC's jurisdiction (except with respect to accounting matters) so as to eliminate that potential.

As discussed throughout this brief, FPA Section 318 denies jurisdiction to the FERC under the FPA only when (1) there is a provision of the HCA which is "self-operative" (in the sense employed by Chairman Purcell), or (2) there is a provision of the HCA which has been implemented by a rule, regulation or order of the SEC and, even then, the FERC is not denied jurisdiction with respect to accounting matters. The spectre of possible "regulatory gaps" conjured

up at page 14 of the Federal Respondents' brief is unsupported[16] and assumes that the SEC and FERC will not adequately discharge their responsibilities.

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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[16] In the case of HCA Section 13(b), for example, the SEC has repeatedly demonstrated the exercise of continuing supervision not only by periodic audits of service company operations but in requiring that no change be made in the organization of an approved service company, in the type and character of the companies to be serviced, in the method of allocating costs to associate companies or in the scope or character of services without prior filings with the SEC. See, *e.g.*, *Allegheny Power Service Corporation*, HCA Release No 15469 (1969), *Middle South Services, Inc.*, HCA Release No. 15207 (1965), *Entergy Corporation*, HCA Release No. 25100 (1990). Similarly, in a series of more than 20 orders over a period of 15 years, the SEC has exercised comprehensive oversight of the creation, financing and operation of New England Energy, Inc., the oil and gas subsidiary of New England Electric System, *e.g.*, *New England Electric System*, HCA Release No. 18635 (1974) through *New England Energy, Inc.*, HCA Release No. 25008 (1989) and has required quarterly reporting of the financial condition and transactions completed since the inception of the program.